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Preliminary References as a Right: But for Whom? The Extent to which Preliminary Reference Decisions can be Subject to Appeal

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Abstract

Until 2008, it was a widely held view that art.267 TFEU allowed the Member States' legal systems to give appellate courts the power to overturn or amend lower courts' decisions on whether or not to request a preliminary reference from the Court of Justice. However, with its 2008 ruling in Cartesio*, the Court of Justice has made it clear that art.267 TFEU gives individual national courts a* right *to make a reference, meaning that it is solely for the individual court to decide whether to make such reference and that this right cannot be denied by a superior national court. The question remains, however, as to what extent the ruling in* Cartesio *also precludes appeals against a lower court's decision to make a preliminary reference—even where the appellate court's ruling on the matter will* not *be binding. This article explores these questions and argues that the better solution is to preclude any appeal against a lower court's decision to make a preliminary reference.*

Introduction

The preliminary reference system, laid down in what is now art.267 of the Treaty on the Functioning of the European Union (TFEU),[1] enables Member States' courts to request the Court of Justice of the European Union (the Court) to provide a binding ruling on the interpretation or validity of an EU legal act, while, in principle, leaving the application of the preliminary ruling to the referring court. The importance of the preliminary reference procedure is hard to overstate, not merely for the development of EU law, but more generally for the development of the European Union as a whole.

The prominent role of the preliminary reference procedure in the EU legal system, together with the very considerable number of preliminary ruling cases that have been decided by the Court, make it natural to assume that all the more important aspects of the preliminary ruling procedure have long been clarified. As will be illustrated here, this is not the case.

The question examined in this article is whether art.267 TFEU vests in an individual Member State court a *right* to make a reference, meaning that it is solely for each court to decide whether or not to make a reference, or whether art.267 TFEU allows the Member States' legal systems to give appellate courts the power to overturn or amend the decisions of lower courts on this issue. This question goes to the heart of the preliminary reference procedure. Already in 1962, in *De Geus*, the Court seemed to accept that references could be subject to appeal, at the same time stating that it would comply with a request for a

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[1] Originally art.177, subsequently art.234 and today—following the entry into force of the Lisbon Treaty—art.267.

preliminary ruling as long as the preliminary questions have not been revoked.[2] The matter was reconsidered in the first *Rheinmühlen* ruling in January 1974, when the Court ruled that:

> "A rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to refer to the Court questions of interpretation of Community law involving such rulings."[3]

In his Opinion in the case, A.G. Warner had argued the same and suggested that national appellate courts should not have the last word on whether there was a need to ask for a preliminary ruling, so it should not be possible to appeal against a decision to make a reference.[4] However, less than a month later, in the second *Rheinmühlen* ruling, the Court held that:

> "In the case of a court against whose decisions there is a judicial remedy under national law, Article 177 does not preclude a decision of such a court referring a question to this court for a preliminary ruling from remaining subject to the remedies normally available under national law."[5]

Moreover, in subsequent cases the Court has accepted that appellate courts may annul preliminary references submitted by lower courts.[6] Hence, it was a matter for national law to determine whether an appeal was possible in such situations.[7] From the perspective of EU law, the preliminary reference procedure thus merely constituted an option for individual national courts—not an indefeasible right.

Nevertheless, towards the end of 2008, in its ruling in the *Cartesio* case,[8] the Court arguably modified that situation. The present article sets out to analyse this ruling and, in particular, its consequences for the rights of national courts to make preliminary references. In so doing, we first provide an account of the

[2] *Robert Bosch GmbH v Kleding Verkoopbedriff de Geus en Uitenbogerd* (13/61) [1962] E.C.R. 45; [1962] C.M.L.R. 1.

[3] *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (166/73) [1974] E.C.R. 33; [1974] 1 C.M.L.R. 523 at [4]. The Court has confirmed its *Rheinmühlen I* ruling in *Elchinov Natsionalna Zdravnoosiguritelna Kasa* (C-173/09) [2011] 1 C.M.L.R. 29 at [25]–[27].

[4] See, for example, the case note by J.A. Winter in (1974) C.M.L. Rev. 216, 220.

[5] *Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (146/73) [1974] E.C.R. 139 at [3].

[6] See [48]–[49] in A.G. Colomer's Opinion in *Beecham Group Plc v Andacon NV* (C-132/07) [2009] E.C.R. I-1775, with further references to that more recent case law—in particular to unpublished rulings.

[7] In this respect, the Member States have opted for different solutions. In the United Kingdom, appeals have been accepted (see e.g. Court of Appeal, Civil Division, July 16, 2002, *R. (on the application of on the application of A) v Secretary of State for the Home Department* [2002] European Law Reports 580) and *R. (on the application of Federation of Technological Industries) v Customs and Excise Commissioners* [2004] EWCA Civ 1020 at [7]–[15]. The same goes for the Netherlands (see Crowe, "Colloquium Report, The Preliminary Reference Procedure: Reflections based on Practical Experience of the Highest National Courts in Administrative Matters" (2004) 5 *ERA Forum* 435, 437) (see further: *http://www.springerlink.com/content/u84krw1143431662/* [Accessed March 23, 2011]) as well as for France—as reflected in the Conseil d'État's quashing of the Paris Administrative Tribunal's decision to make a preliminary ruling in the *Cohn-Bendit* case (CE, Ass., 22 décembre 1978, *Ministre de l'intérieur c. D. Cohn-Bendit, Rec. Leb*, 1978, p.524). This was originally the case with regard to Denmark (see the decisions published in *Ugeskrift for Retsvæsen*, 1989.651 Ø, 1990.505 H, 1996.111 H and 2003.233 Ø). Such an appeal has also been accepted in Germany (Bundesverwaltungsgericht, in its decision of January 28, 1997, 1 C 17/94 [1997] Neue Zeitschrift für Verwaltungsrecht 1119). In contrast, the right to appeal against decisions to make preliminary references has been denied in Belgium (see the decision of March 5, 1999 of the Cour d'appel de Bruxelles, No.322/96, mentioned in the European Commission's Seventeenth Annual Report on Monitoring the Application of Community law [2001] OJ C 30/192 at 194), in Ireland (see *Campus Oil v Minister for Industry and Energy* [1983] I.R. 82), in Italy (see case No.7636, decision of May 24, 2002, *Foro italiano* 2002, I, col.3090), and in Austria (see Oberster Gerichtshof's decision of December 9, 1997 in case 16 Ok 9/96). For a description of other Member States' case law, see Bobek, "Cartesio — Appeals Against an Order to Refer under Article 234(2) of the EC Treaty Revisited" (2010) 29 C.J.Q 307.

[8] *Cartesio Oktato es Szolgaltato bt* (C-210/06) [2008] E.C.R. I-9641; [2008] B.C.C. 745.

Court's ruling in *Cartesio*, followed by an analysis of the significance of *Cartesio* for national procedural systems. The question of how national courts should react to the *Cartesio* ruling has been raised in two Danish Supreme Court decisions.[9] Taking these decisions as our point of departure, we discuss how we believe that national courts should react to *Cartesio*, before reaching our conclusion.

The *Cartesio* ruling

In the *Cartesio* case, the Hungarian authorities had rejected an application from a Hungarian company (Cartesio) for registration in the commercial register of the transfer of its company seat from Hungary to Italy. Cartesio challenged this decision before a Hungarian court, arguing that it contravened the European Union's rules on freedom of establishment. Against this background, the Hungarian court decided to make a preliminary reference to the Court of Justice on the interpretation of the relevant Treaty provision. The Hungarian court added a question as to whether it was compatible with EU law for domestic law to allow a decision to make a preliminary reference to be appealed to a superior national court which could either amend the order or render it inoperative.

The Court first restated its established case law, according to which art.267 TFEU does not preclude a decision of a national court to make a preliminary reference "from remaining subject to the remedies normally available under national law"; i.e. a decision to make a preliminary reference could be appealed to a superior national court.[10] Thus far the ruling appeared to be in line with the Court's previous practice.

However, in the very same paragraph, the Court added that:

> "The outcome of such an appeal cannot limit the jurisdiction conferred by Article [267 TFEU] on [the referring national] court to make a reference to the Court *if it considers* that a case pending before *it* raises questions on the interpretation of provisions of [EU] law necessitating a ruling by the Court."[11]

The Court ruled that this was so since, in those cases where it is only the decision to make a preliminary reference (and not the main proceedings) that is subject to appeal,

> "[t]he autonomous jurisdiction which Article [267 TFEU] confers on the referring court to make a reference to the Court would be called into question, if — by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings — the appellate court could prevent the referring court from exercising the right, conferred on it by the [Treaty on the Functioning of the European Union] to make a reference to the Cour.'[12]

The Court ruled that this would not be acceptable since, in principle, responsibility for assessing the relevance and necessity of making a preliminary reference lies with the referring court *alone*.[13]

Against this background, the Court modified its previous doctrine and ruled that, in a situation like that outlined by the referring Hungarian court, art.267 TFEU,

[9] Danish Supreme Court Order of February 11, 2010 in *Lady & Kid*, published in [2010] *Ugeskrift for Retsvæsen* 1389 H. A press release on the case is available in English at *http://www.domstol.dk/hojesteret/english/ECLaw/Pages/AppealregardingrejectiontohearreferencetotheCourtofJusticeonitsmerits.aspx* [Accessed March 23, 2011] and a summary, in French, of some of the central paragraphs of the order is provided in the European Court of Justice's publication (2010) 2 *Réflets* 10. Also the Danish Supreme Court Order of May 7, 2010 in *Pro Display v HK Danmark* published in [2010] Ugeskrift for Retsvæsen 2125 H. See also the pending *Lady & Kid* (C-398/09), opinion given December 2010.

[10] *Cartesio* (C-210/06) [2008] E.C.R. I-9641 at [93].

[11] *Cartesio* (C-210/06) [2008] E.C.R. I-9641 at [93] (emphasis added). Article 267 TFEU only allows national courts to make preliminary references where the questions referred are relevant to deciding the main proceedings.

[12] *Cartesio* (C-210/06) [2008] E.C.R. I-9641 at [95].

[13] *Cartesio* (C-210/06) [2008] E.C.R. I-9641 at [96].

> "is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings."[14]

The Court thus viewed the right of a national court to make a preliminary reference as a Treaty-based "right" of the individual court before which the main proceedings are pending. Thus the Court expressly ruled that:

> "The autonomous jurisdiction which Article [267 TFEU] confers on the referring court to make a reference to the Court would be called into question, if … the appellate court could prevent the referring court from exercising the right, conferred on it by the … Treaty, to make a reference to the Court."[15]

In essence, in *Cartesio*, the Court established that, while nothing prevents a lower national court's decision to make a preliminary reference being appealed to a superior court, art.267 TFEU precludes the decision of the appellate court having a binding effect on the referring (lower) national court; the decision of the superior court is merely an advisory opinion for the lower court as, under art.267 TFEU, a national court's jurisdiction to make a preliminary reference cannot be limited.[16]

It appears, therefore, that the Court at one and the same time wanted to give full effect to art.267 TFEU and to pay due respect to the procedural autonomy of the Member States. Some might find that it would have been more consistent if the Court had either stuck with its previous doctrine of allowing binding appeals or had construed art.267 TFEU so as to deny the right to appeal against the decisions of national courts on preliminary references, instead of allowing such appeals while depriving the decisions of the appellate courts of binding effect. However, as we shall show later in this article, the Court's construction of art.267 TFEU has the advantage of not preventing national appellate courts from being able to withdraw preliminary references submitted by lower courts in cases where the appellate court is not merely ruling on whether the preliminary reference should be made, but also on the main proceedings. In these situations, there will no longer be a case pending before the lower court that has referred a preliminary reference. Indeed, the consequences would be even more far-reaching in those Member States where an appeal against an interim measure of a lower court may give the appellate court jurisdiction not only to decide on the interim measure but also on the main proceedings. Thus, if the Court had insisted that in no circumstances could an appellate court admit an appeal against a decision to make a preliminary reference, in the latter Member States this would also have barred appeals against decisions of lower courts to make a preliminary reference. That this concern is well founded is aptly reflected by a reference from a Belgian court in the *De Nationale Loterij* case.[17] The ruling in *Cartesio* also caters for those national procedural systems where it is possible for decisions on preliminary references to be subject to a non-binding appeal.

The consequences of the *Cartesio* ruling will vary from Member State to Member State—according to their procedural laws. In those Member States where, prior to the *Cartesio* ruling, there was no right of appeal against decisions to make preliminary references, the ruling is unlikely to cause any changes. In contrast, in those Member States where such appeal was possible prior to the Court's ruling in *Cartesio*, the consequences may be far-reaching, depending on how the different national courts and legislators react to the judgment. The ruling in *Cartesio* does not preclude national appellate courts from hearing

[14] *Cartesio* (C-210/06) [2008] E.C.R. I-9641 at [98].
[15] *Cartesio* (C-210/06) [2008] E.C.R. I-9641 at [95].
[16] M.P. Broberg and N. Fenger, *Preliminary References to the European Court of Justice* (Oxford: Oxford University Press 2010), p.327.
[17] *De Nationale Loterij NV v Cutomer Service Agency BVBA* (C-525/06) [2009] E.C.R. I-2197.

appeals on decisions to make preliminary references. It merely precludes the decisions of the appellate courts from having the binding effect that would otherwise follow under national law. It is therefore possible to limit the effects of the *Cartesio* ruling if appellate courts continue to hear appeals on preliminary reference decisions, even though their rulings will not be binding. In those Member States where appellate courts will continue to admit appeals against decisions to make a preliminary reference, if an appellate court overrules a lower court's decision, this will put the lower court in a rather delicate position. The lower court will have to choose between complying with the "non-binding ruling" of the appellate court and maintaining that there is a need for a preliminary reference. One could say that the *Cartesio* ruling has made the lower court superior to the appellate court and reversed the hierarchy between them in this respect (a point discussed in more detail below).

Consequences of *Cartesio* for national procedural systems

The *Cartesio* ruling may have clarified the EU law aspects of whether the preliminary reference procedure constitutes a right for individual national courts or whether it may be circumscribed by superior courts, but it has given rise to new questions in those national jurisdictions where it was possible to appeal against a decision to make or not to make a preliminary reference. It is important to bear in mind that *Cartesio* is purely concerned with the effects of an appeal against a decision to make a preliminary reference to obtain guidance on issues of EU law. This ruling does not affect appeals contesting the jurisdiction of the referring court under national law, nor does it relate to interlocutory appeals on matters solely related to national law or an obligation merely to inform national bodies such as the Ministry of Justice when a preliminary ruling has been made.[18]

Appeals on matters falling outside the Court's jurisdiction under article 267 TFEU

A preliminary reference must concern the validity or interpretation of EU law. Article 267 TFEU does not give the Court jurisdiction to consider the facts of the main proceedings or the validity or interpretation of national law. Thus art.267 TFEU does not preclude an appellate court from considering these aspects of the main proceedings with binding effect, even in connection with an appeal against a lower court's decision to make a preliminary reference. The ruling in *Cartesio* does not appear to make any change in this regard.

If an appellate court disagrees with a lower court about the statement of the facts or about the national law applicable in the main proceedings, and if it overruled these elements of the lower court's decision to make a preliminary reference, this may well mean that a preliminary reference about EU law becomes hypothetical and thus inadmissible, since the Court does not rule on hypothetical questions. Hence, *if* a decision to make a preliminary reference is appealed to a higher court, *if* this higher court overrules a statement of the facts and/or national law in the preliminary reference, and *if* this means that one or more of the questions in the preliminary reference becomes hypothetical, then the preliminary reference will become inadmissible. *Cartesio* does not preclude appeals against decisions to make preliminary references whereby the appellate court renders a reference hypothetical. However, even where an appellate court essentially undermines the basis for a lower court making a preliminary reference, the ruling in *Cartesio* arguably means that the appellate court cannot itself withdraw the reference. Instead it appears to mean that the referring lower court must itself decide whether the appellate court's ruling on the facts or on national law means that the basis for making a preliminary reference has been rendered void.

There is a somewhat parallel situation where a lower court decides to make a preliminary reference at a very early stage of the main proceedings, when the facts of the case are still subject to so much doubt

[18] Regarding the last-mentioned situation, see *VB Pénzügyi Lízing Zrt.* (C-137/08) November 9, 2010 at [26].

that it is not possible adequately to identify the exact question of EU law that is in doubt, so there may be a need to postpone making a preliminary reference. While the Court's ruling in *Cartesio* establishes that national appellate courts are barred from ruling on whether or not to make a preliminary reference, its reasoning does not appear to deal directly with the question of whether an appellate court may require a lower court to postpone making such reference. It is therefore possible that an appellate court can oblige a lower court to postpone deciding whether to make a preliminary reference until a later stage of the main proceedings. At the same time, it must be acknowledged that such postponement would sit somewhat uneasily with the Court's finding that the right to make a preliminary reference is a right of the *individual* court.

Appeal on the ground that the referring court does not have jurisdiction under national law to rule on the matters in the preliminary reference

In order to make a preliminary reference, the referring court must have jurisdiction to apply the Court's response when deciding the main proceedings. In other words, if a national court does not have jurisdiction to rule on the main proceedings, it will not have jurisdiction to make a reference.[19]

The ruling in *Cartesio* does not preclude an appellate court from revoking a preliminary reference on the basis that, under national law, the referring lower court does not have jurisdiction to hear the main proceedings to which the reference relates, for example, where the suit has been filed with the wrong court. A preliminary reference may also be revoked in more delicate circumstances, such as where the referring judge proves not to be eligible to hear the main proceedings and so was not eligible either at the time when the preliminary reference was made (e.g. because it becomes apparent that the judge has a personal interest in the case before him). Or the defendant may contest the legal standing of the plaintiff and the appeal court may agree, in interlocutory proceedings, that the suit is inadmissible, but only after the lower court has already made a preliminary reference on questions of EU law relating to the substance of the case. Where the consequence of such an appeal decision is that the case is no longer pending before the referring court, the appeal court may itself revoke the preliminary reference.

Even where the lower court has jurisdiction to hear the main proceedings, there may be situations where a request for a preliminary reference may be overturned on appeal. This will be the case where a lower court submits a reference in a situation where, under national law, it will not have jurisdiction to apply the answer to the main proceedings. For example, a lower court may only have jurisdiction to rule on the civil law aspects of the main proceedings, but nevertheless refer a question on some aspect of criminal law. It may also be that elements of the main proceedings are time-barred owing to national rules on periods of limitation for bringing proceedings, but that the court hearing the case nevertheless decides to include questions concerning the time-barred aspects. A finding by an appellate court, in an interlocutory appeal, that the lower court lacks jurisdiction over a part of the main proceedings to which a preliminary question refers necessarily means that the question becomes hypothetical for the referring court. Consequently the question falls outside the scope of art.267 TFEU. However, since the main proceedings are still pending before the referring lower court, we consider that the appellate court could not revoke the preliminary reference; only the referring court can do this.

[19] However, in one situation, the Court will answer a preliminary reference from a national court that may not have jurisdiction to hear the main proceedings, namely where the preliminary reference is intended to clarify precisely whether or not the referring court does have jurisdiction. An illustration is where a national court makes a preliminary reference concerning the interpretation of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1. Here, the answer of the Court may be decisive for whether the referring national court has jurisdiction in the main proceedings.

Where the main proceedings are finalised in connection with the appeal of a decision to make a preliminary reference

The principle laid down in *Cartesio* only applies where the dispute in the main proceedings continues before the referring court after the appellate court has given its decision. If either the appeal itself or the decision of the appellate court means that the case is no longer pending before the referring court, then the referring court loses its jurisdiction to make a preliminary reference.

In *De Nationale Loterij*, the Belgian Rechtbank van koophandel te Hasselt referred two preliminary questions concerning the relationship between the (then) EC Treaty rules on freedom to provide services and a Belgian law granting monopoly rights to De Nationale Loterij, Belgium's public gaming company. This decision to make a preliminary reference was appealed to the Hof van beroep te Antwerpen which found that the case law of the Court of Justice provided sufficient clarity for it to decide the main proceedings. The Hof van beroep te Antwerpen therefore annulled the decision to make a preliminary reference and, at the same time, ruled on the substance of the case. This prompted the question whether the Court of Justice could strike the case from its register merely on the basis of the appellate court's decision, or whether the ruling in *Cartesio* meant that only the referring court could withdraw the preliminary reference. The Court of Justice noted that, in *Cartesio*, the main proceedings remained pending before the referring court in their entirety, since it was only the referring court's decision to make a preliminary reference to the Court that had been appealed. In such a situation, the referring court's jurisdiction to make a preliminary reference could not be called into question by national rules permitting the appellate court to set aside the reference and order the referring court to resume the proceedings under domestic law. However, this result did not apply to the altogether different situation in the main proceedings in *De Nationale Loterij*, where the appellate court itself decided the dispute in the main proceedings and thereby took it upon itself to ensure the application of EU law. In this latter situation, the dispute was no longer pending before the referring court, and it was therefore not material that the referring court had not withdrawn the preliminary reference.[20]

Where a referring court loses jurisdiction to decide the main proceedings after making a preliminary reference

As noted above, for the Court to make a preliminary ruling under art.267 TFEU, the referring court must be able to apply the ruling to the main proceedings. This requirement is not fulfilled if a national court has jurisdiction when submitting a preliminary reference, but subsequently loses it because jurisdiction to rule on the main proceedings is transferred to another court or tribunal, irrespective of who has initiated the transfer of the case to that other court. The ruling in *Cartesio* does not change this. For example, in some Member States, the parties to the main proceedings may request that the case be transferred to another court.[21] The initiative to transfer the main proceedings may also come from the referring court or from the court to which the main proceedings are transferred, or it may come from some third party who has the right to initiate such a transfer under the relevant procedural rules.

A national court may also lose jurisdiction to decide the main proceedings simply because the parties discontinue the proceedings, for example, because they settle the dispute. This was the situation in the *Beecham* case, where a preliminary reference had been appealed to a higher court while the main proceedings remained with the referring lower court. However the parties resolved the dispute amicably, thus terminating the main proceedings. This led the higher court to inform the Court of Justice that it had recorded that the dispute had been resolved and had ordered the proceedings to be removed from the

[20] *De Nationale Loterij* (C-525/06) [2009] E.C.R. I-2197.
[21] e.g. in Denmark; see s.226(1) of the Danish Act on Court Procedure.

register. Since there were no longer any pending national proceedings, the Court ordered that the preliminary reference should be removed from its Register,[22] and no answer was given to the lower court's preliminary reference. Arguably, it is immaterial whether the main proceedings are discontinued at the initiative of the parties, the referring court or a superior court. What is decisive is that the main proceedings are lawfully terminated.

The situation is somewhat different where it is not the jurisdiction of the referring court as such that is affected, but rather the competence of one or more of the judges hearing the main proceedings. For example, a judge may fall ill or even die so that another judge of the same court has to take over the case. If a preliminary reference has been made to the Court of Justice before the change of judge, the reference will not be affected since the main proceedings remain with the same court. As noted above, the same is true where, after having made a preliminary reference, a judge is disqualified for reasons of his or her eligibility to hear the case. If the judge was qualified when making the preliminary reference, and if the main proceedings remain pending before the same court, the reference will not be affected by the disqualification.

The ruling in *Cartesio* means that in a situation where the judge hearing the main proceedings is replaced, but where the proceedings remain pending before the same court, an appellate court will not be competent to withdraw or amend a preliminary reference. Only if the main proceedings are transferred to another court after a preliminary reference has been made can this affect the reference. Where the main proceedings have been transferred to another court, the new court must either confirm or amend the original preliminary reference in order for the Court of Justice to issue a preliminary ruling, as explained immediately above.

Appeal against a refusal either to make a preliminary reference or to include certain questions in a preliminary reference

In *Cartesio*, the Court did not explicitly address the question of whether an appellate court is merely precluded from overruling a lower court's decision to make a preliminary reference, or whether an appellate court is entirely barred from interfering with a lower court's decision regarding a preliminary reference. This distinction is relevant where a lower court has declined to make a preliminary reference and where an appellate court finds that such a reference should be made; it is also relevant where a lower court has made a preliminary reference, but where an appellate court considers that the reference is too narrow and should be expanded, for instance by asking more questions or by including more EU rules in the reference.[23]

The reasoning applied by the Court in *Cartesio* seems to indicate that the preliminary reference procedure under art.267 TFEU provides a legal remedy for the individual court, not for the national courts as a whole. The logical inference from this appears to be that each court that is responsible for deciding respective main proceedings independently has the authority to decide what assistance it needs from the Court of Justice. Construing *Cartesio* in this way leads to the conclusion that a superior court cannot, with binding effect, interfere with a lower court's decision regarding a preliminary reference, and that this is so even where the lower court decides not to make a preliminary reference in a situation where the superior court finds that this would be appropriate or perhaps even obligatory under art.267 TFEU.

Nevertheless, there are also arguments in favour of accepting the binding effects of appeal decisions that force a lower court to make a preliminary reference or to expand a reference.

The restrictions that the ruling in *Cartesio* imposes on appeal courts' powers over lower courts' decisions to make preliminary references have enhanced the probability that a given reference will reach the Court

[22] *Beecham Group Plc v Andacon NV* (C-132/07) [2009] E.C.R. I-1775.

[23] See, for example, the case law of the French Cour de Cassation as summarised in its *Rapport annuel 2006* at pp.121–123 under heading 1.1.4: "Les cas de contrôle de la motivation des cours d'appel statuant sur une demande de renvoi préjudiciel (dont l'hypothèse d'une juridiction du fond ayant refusé à tort de poser la question préjudicielle)", at *http://www.courdecassation.fr/IMG/pdf/cour_cassation-rapport_2006.pdf* [Accessed March 2, 2011].

of Justice in Luxembourg. These restrictions are likely to make a lower national court more willing to make such reference since there will be no risk that its decision to refer will be quashed on appeal, with the loss of prestige this may entail. In this respect, the ruling in *Cartesio* has enhanced the effectiveness of EU law. However, this effectiveness argument only applies where a superior court would have prevented a lower court from making a preliminary reference. In contrast, where a superior court would have overturned a refusal to make a preliminary reference or would have expanded the questions put to the Court of Justice, the effectiveness argument would seem to favour accepting the binding effect of appellate court decisions. This is all the more so given that an appeal court's authority to overturn a lower court's decision not to make a preliminary reference would enhance the likelihood of the correct solution being reached in the main proceedings, whereas overturning a decision to make a reference may lead to the opposite result. Finally, overturning a lower court's decision to make a preliminary reference, thereby preventing it from obtaining the assistance it considers necessary, arguably constitutes a more far-reaching interference in that court's affairs than requiring the court to obtain such assistance even if it finds it unnecessary. This is especially so if the lower court acts as a court of last instance within the meaning of art.267(3) TFEU.

It is thus understandable that some distinguish between appeals against decisions to make a preliminary reference and appeals against refusals to make such reference.[24]

National constitutionality review precludes preliminary references

In 2010—after the ruling in *Cartesio*—the Court of Justice was faced with a somewhat related situation. In some Member States, legislation establishes an interlocutory procedure for the review of the constitutionality of national laws, requiring the courts of that Member State to rule as a matter of priority on whether to refer, to a constitutional court, a question on whether a provision of national law is consistent with the constitution. If the case equally raises the question whether the provision in question conflicts with Union law, the national review procedure regarding constitutionality could be interpreted to mean that the Member State court would be prevented from making a preliminary reference while the question of constitutionality was under review. Under such interpretation of national law, the national legislation would result in the ordinary and administrative national courts being prevented, both before submitting a question on constitutionality and, as the case may be, after the decision of the constitutional court on that question, from exercising their right or fulfilling their obligation, provided for in art.267 TFEU, to refer questions to the Court of Justice for a preliminary ruling. In *Melki* and *Abdeli*, the Court of Justice ruled that art.267 TFEU precludes such national legislation.[25] Hence the lower national courts must retain their competence to seek a preliminary ruling at any stage they consider it appropriate—and this also includes the end of the interlocutory procedure at issue.[26]

[24] The Danish Supreme Court has drawn this distinction, as can be seen from its ruling in *Lady & Kid* [2010] Ugeskrift for Retsvæsen 1389 H as discussed below, and its decision in *Pro Display v HK Danmark* [2010] Ugeskrift for Retsvæsen 2125 Ü, where it overturned a lower court's decision not to refer a preliminary question.

[25] *Melki* and *Abdeli* (C-188/10 and C-189/10) June 22, 2010, at [41]–[47]. See also *Mecanarte* (C-348/89) [1991] E.C.R. I-3277 at [41]–[46].

[26] See likewise Asterios Pliakos and Georgios Anagnostaras, "Who is the Ultimate Arbiter? The Battle Over Judicial Supremacy in EU Law" (2011) E.L. Rev 109 at 116, 117 (text accompanying fn.44ff—in particular text accompanying fn.50).

How should national courts react to the *Cartesio* ruling? Some suggestions

The Danish Supreme Court ruling in Lady & Kid

In those Member States where, prior to the ruling in *Cartesio*, appellate courts had jurisdiction to overrule decisions of lower courts to make preliminary references, the question now arises as to how these appellate courts should react. In this respect, the Danish Supreme Court's order in *Lady & Kid* provides a vivid illustration of the choices which national courts face.[27] This order originated in civil litigation before the Danish Eastern High Court between a number of undertakings as plaintiffs and the Danish Ministry of Taxation as defendant. According to the undertakings, the Danish tax authorities should repay a tax which had been imposed on the undertakings in contravention of EU law. The High Court decided to stay the proceedings in order to make a preliminary reference to the Court of Justice. The tax authorities appealed to the Danish Supreme Court against this decision.

In their pleadings, the tax authorities argued, first, that there was no reasonable doubt about the requirements of EU law concerning the repayment of an unlawfully imposed tax. Hence there was no basis for making preliminary reference to the Court. Secondly, the tax authorities argued that some of the preliminary questions were incomprehensible and did not properly reflect the facts of the case. The tax authorities claimed that this made the questions hypothetical. Thirdly, the tax authorities argued that the giving of evidence to the High Court should have been completed before deciding whether or not to make a preliminary reference.

At the time when the tax authorities appealed against the High Court's decision to make a preliminary reference in Lady & Kid, it was the established practice in Denmark that such decisions could be subject to appeal.[28] Nevertheless, in this case, the tax authorities readily acknowledged that, following the Court ruling in *Cartesio*, the Supreme Court could no longer deprive the High Court of the right to make a preliminary reference under art.267 TFEU. In other words, the tax authorities accepted that the *Cartesio* ruling precludes an appellate court from overruling a lower court's decision to make a preliminary reference. However, the tax authorities went on to argue that the ruling in *Cartesio* did not prevent an appellate court from rescinding a lower court's decision to make preliminary references since, following such rescission, the lower court could simply make a new decision to uphold the original preliminary reference, or it could decide to refer some new questions to the Court.

The plaintiff undertakings did not agree with the tax authorities. They claimed that the appeal should be dismissed and supported their claim with the argument that, under Danish law, an appeal could only be admitted if a reversal of the original decision would be binding on the lower court. Since it was not disputed in the *Lady & Kid* case that a reversal of the original decision would not be binding on the High Court, it would be contrary to Danish procedural law to allow an appeal in this situation, the plaintiffs argued.

In its ruling, the Supreme Court first unanimously ruled that it followed from the Court of Justice's ruling in *Cartesio* that an appellate court is not competent to overturn a lower court's decision to make a preliminary reference. Hence, the Supreme Court could not require the Danish Eastern High Court to vary its order for reference, *or* to abstain from submitting the reference to the Court of Justice, *or* to withdraw a reference which had already been referred to Luxembourg. Following this initial and unanimous ruling, the Supreme Court turned to the question of the consequences of this for the construction of Danish law. Six of the seven judges supported a majority ruling which essentially followed the argument of the plaintiffs. One judge gave a dissenting opinion, largely following the argument of the Danish tax authorities.

[27] See *Lady & Kid* [2010] Ugeskrift for Retsvæsen 1389 H.
[28] See the decisions published in *Ugeskrift for Retsvæsen*, 1989.651 Ø, 1990.505 H, 1996.111 H and 2003.233 Ø.

The dissenting judge based her opinion on the view that it was important that superior courts were able to recall manifestly unfounded preliminary references, and that this power of the superior courts should be retained as far as possible. She therefore found that, to the extent possible following the *Cartesio* ruling, litigants should continue to have a right of appeal when a court decided to make a preliminary reference. It followed, she said, that if an appellate court were to overturn a lower court's decision to make a preliminary reference, the appellate court's decision would be required to state that it was within the power of the lower court to decide whether to maintain, vary or withdraw the reference. According to the dissenting opinion, it would be suitable to maintain a right of appeal under these circumstances since it would give the referring lower court a possibility of reconsidering whether or not to make a reference in the light of the reasoning of the appellate court. In addition, such an appeal would allow the possibility of examining the lower court's finding that a preliminary reference was necessary, and make it possible to consider the lower court's presentation of the preliminary questions. On this basis, the dissenting judge voted in favour of allowing the appeal.

While the dissenting judge favoured retaining as much of the existing scheme as possible, the six judges who supported the majority opinion opted for a more wide-reaching solution. In their view, it was difficult to reconcile the Danish appellate court system, where a decision of a lower court could be overruled by an appellate court, with a system where a decision on an appeal regarding a preliminary reference would not be binding. Moreover, the majority considered that there was no appreciable need for this type of special arrangement, not least because the appellate court would have to show considerable restraint in its examination of the lower court's decision to make a preliminary reference. On this basis the majority ruled that, following *Cartesio*, decisions by Danish courts to make preliminary references should no longer be subject to appeal. Consequently, the appeal against the High Court's decision to make a preliminary reference in *Lady & Kid* was dismissed. In contrast, the Supreme Court majority ruled that appeals against decisions not to refer would still be possible and, in this situation, an appeal decision that a reference should be made would be binding on a lower court. Indeed, in a subsequent decision the Danish Supreme Court has overturned a lower court's decision not to make a preliminary reference—thereby in effect forcing the lower court to make such reference.[29]

A minimalist approach versus a comprehensive solution

As is illustrated by the Danish *Lady & Kid* case, whether appeals against decisions to make preliminary references are possible under national law is not a matter of Union law but of national procedural law, provided that the non-binding character of the appeal decision is acknowledged. Hence, following *Cartesio*, it is for each national legal system to decide whether its appellate courts may issue non-binding rulings on such appeals, or whether the national appellate court must decline to hear such appeals because it will be incompatible with national law to issue rulings that are not binding on the lower courts whose decision are subject to appeal. As shown, the dissenting judge in *Lady & Kid* favoured a minimalist approach while the majority favoured a more comprehensive solution. In our opinion, both have advantages as well as drawbacks.

The strongest argument in favour of the minimalist approach is probably that if a Member State's laws were to allow appeals against decisions to make preliminary references, then the courts should allow such appeals even if the legal effects of an appeal decision will be non-binding. While we accept the strength of this argument, we nevertheless believe that those arguments which favour a more comprehensive solution, as reflected in the majority opinion in *Lady & Kid*, outweigh the arguments in favour of the minimalist approach.

[29] See *Pro Display v HK Danmark* [2010] Ugeskrift for Retsvæsen 2125 H.

First, at the heart of an appellate system lies the idea that a higher court may overrule a lower court's decision where necessary. If the higher court does not have the power to do this, the relationship is changed from one of subordination to one of co-operation. Presumably such co-operation could work if the lower court itself were to decide whether to ask the advice of the superior court, if such a procedural scheme exists in any Member State. However, in our opinion, such a scheme would lack consistency if the parties to the main proceedings were to have the right to appeal against the lower court's decision but the appellate court did not have the power to overrule the appealed decision.

Secondly, as observed above, the minimalist approach will put a lower court in the rather delicate situation of having to choose between complying with the non-binding "advice" of an appeal court or maintaining that there is a need for a preliminary reference. Leaving this choice to the lower court essentially means that it is given the power to overturn the determination of the appellate court. If a lower court decides not to follow an appellate court's "advice" to refrain from making a preliminary reference, the party who has appealed against the lower court's original decision to make a preliminary reference may also decide to appeal against this new decision of "non-compliance" and, in principle, an appellate court could decide to overrule the lower court's decision in a non-binding manner, and a new round could start. Theoretically, this could lead to there being a never-ending "appeal loop".

Thirdly, as observed by the majority in *Lady & Kid*, we should not overestimate the need for appealing against preliminary references. Even prior to the *Cartesio* ruling, appellate courts had to be cautious in setting aside a lower court's assessment of whether it needed assistance from the Court before deciding in the main proceedings. Other than in extreme cases, it would be problematic for a superior court to deny a lower court the right to make a preliminary reference on the grounds that, even though the lower court may have doubts about the correct interpretation of EU law, these doubts are not justified. Indeed, if the superior court were to provide its own interpretation of the relevant EU provision, it would lay itself open to the criticism that giving such interpretation would be at odds with the parties' right to have a new impartial hearing of the case upon an appeal. At the same time, it must also be acknowledged that, if a superior court considers that the interpretation of the relevant EU provision is not open to reasonable doubt, it would be unsatisfactory if it were to abstain from providing this interpretation in its ruling.

It could be argued that if a lower court is too cautious and wants to make a preliminary reference in a situation where such reference is clearly not needed, this is likely to be detrimental to one or perhaps both parties to the main proceedings. In this situation, the minimalist approach will be better suited to protecting the parties than the comprehensive solution favoured by the authors. Nevertheless, it would not be surprising if the number of justified preliminary references stopped by appellate courts prior to the ruling in *Cartesio* was higher than the number of superfluous references actually decided by the Court.

Another argument for supporting the minimalist approach is that it may make it possible to prevent a lower court from asking hypothetical questions or from basing a preliminary reference on an erroneous interpretation of the facts.[30] While this is correct, this type of problem is likely to be discovered either by the Court when hearing the reference or by the referring court itself when applying the preliminary ruling to the main proceedings. Therefore, in our opinion, the possible benefits of the minimalist approach cannot outweigh the advantages of the more comprehensive solution listed above.

Conclusion

In *Cartesio*, the Court of Justice has made it clear that art.267 TFEU gives individual national courts a *right* to make a reference, meaning that it is solely for the individual court to decide whether or not to make a reference. This right cannot be denied by a superior national court. However, the *Cartesio* ruling has also given rise to new questions in those Member States where, prior to the ruling, appeals against

[30] Note that only the Court of Justice is competent to dismiss a preliminary reference as hypothetical.

decisions on preliminary references were possible. We show above that *Cartesio* opens up two possible methods for dealing with this new situation: a minimalist approach and a more comprehensive solution. The comprehensive solution means that it will not be possible to appeal against decisions to make preliminary references if the appellate court's decision will not be binding on the lower court. In our opinion, therefore, the comprehensive solution provides the better solution.